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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DOLORES FLORES, Plaintiff and Appellant, v. COUNTY OF KERN, Defendant and Respondent.	F066221 (Super. Ct. No. S-1500-CV-273443) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Law Offices of Robert J. Scuderi, Robert J. Scuderi for Plaintiff and Appellant.

Theresa A. Goldner, County Counsel, Marshall S. Fontes, Deputy County Counsel for Defendant and Respondent.

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Plaintiff Dolores Flores appeals from the trial court's granting of a motion for nonsuit on her cause of action for disability discrimination under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).[1] The only cause of action

[1]Subsequent statutory references are to the Government Code.

remaining in the case when the court ruled on the motion was Flores's claim that defendant Kern County (county) failed to engage in an interactive process to identify and implement a reasonable accommodation (§ 12940, subd. (n)). We hold that the trial court did not err in granting the motion on this cause of action.

FACTS AND PROCEDURAL HISTORY

Flores filed her complaint on April 11, 2011. It alleged that she had been employed by the county as a patient services associate since 2005 and had been injured in 2008. Because of her injuries, she was restricted in her ability to work and had had absences from work. The county terminated her employment on June 23, 2010, because of her absences and work restrictions. The complaint alleged three causes of action under the FEHA: (1) discrimination on the basis of physical disability (§ 12940, subd. (a)); (2) failure to make reasonable accommodations for a physical disability (§ 12940, subd. (m)); and (3) failure to engage in a good-faith interactive process to determine effective reasonable accommodations (§ 12940, subd. (n)).

At the trial on August 27, 28 and 29, 2012, Flores called two witnesses: Renita Nunn, who was a supervisor in the human resources department at Kern Medical Center where Flores had worked, and Flores herself.

Nunn testified that Flores's duties as a patient services associate included transporting patients, cleaning rooms, carrying food trays, and similar tasks. Flores was paid $10.78 per hour when she started working and $14.11 per hour at the time of her termination.

In December 2008, Flores injured her back while lifting bags of trash. A series of leaves of absence followed, each supported by doctors' notes. The last of these began on April 14, 2010. Flores's request for that leave was supported by a letter from a doctor requesting that Flores be excused from work from April 14, 2010 to June 16, 2010. The note stated that Flores had lower back pain radiating down both legs.

Nunn testified that on April 14, 2010, Flores did not have enough leave time left under civil service rules or under the Family Medical Leave Act (FMLA) or the California Family Rights Act (CFRA) to cover the two-month leave period requested by the doctor. There was no time left under the FMLA or the CFRA. Under the civil service rules, Flores's remaining time would expire on April 27, 2010.

According to Nunn, human resources personnel did not discover that Flores did not have enough leave time to cover the doctor-recommended absence until after Flores had submitted paperwork requesting the leave and left the human resources office. A copy of a document Flores took with her when she left the office showed she was requesting two months off. A human resources employee named Jackie Black altered the original of that document so that it appeared to indicate that Flores had requested a leave only until April 27, 2010. On April 29, 2010, Black mailed a letter to Flores stating that Flores's leave expired on April 27 and that Flores had not submitted a leave request for the period from April 28 to June 16, 2010. The letter asked Flores to submit a new request form and doctor's note for that period. A blank request form was enclosed.

Nunn explained in her testimony that the period after April 27 "would have been considered a personal necessity leave," which was different from the type of leave Flores had requested for April 14 to June 16. It was necessary for Flores to complete a new request form because "[y]ou can't combine two leaves on the same form," and Flores would have needed to check the box for a personal necessity leave on a second form. The original doctor's note covering the entire period from April 14 to June 16 could have been relied on again, however. Nunn said her office could not simply fill out another form and check the correct box because "we can't assume that's what she wanted to do."

Nunn testified about her understanding of the interactive process required by law when an employee requests accommodation of a physical disability. In Nunn's view, this process is required only after an employee returns to work with work restrictions imposed by a workers' compensation doctor. Flores's workers' compensation doctor did not say

Flores had any restrictions. It was her primary-care doctor that recommended she be off work from April 14 to June 16, 2010. Further, the recommendation was that Flores not work at all during that period, not that she work with restrictions. A leave of absence would be considered as a possible accommodation only for employees who "have the entitlements due them" for leave. Nunn felt that the type of situation in which an interactive process is called for "wasn't [Flores's] case at all."

In addition to the April 29, 2010 letter, the appellate record contains two other letters addressed to Flores. A letter dated May 25, 2010, from Steve O'Connor, Hospital Human Resources Director, stated that Flores was absent without leave and that the hospital had made several unsuccessful attempts to contact her. The letter stated that the hospital assumed Flores did not wish to retain her position, that a recommendation to terminate her employment had been made, and that she had a right to respond orally or in writing by June 9, 2010. A letter written by O'Connor and dated June 21, 2010, asserted that Flores had telephoned on June 9 and that a *Skelly*[2] hearing with the chief executive officer had been scheduled at her request for July 8, 2010. Finally, a letter dated July 12, 2010, and signed by Chief Executive Officer Paul Hensler, informed Flores that her employment had been terminated. Hensler stated that Flores had failed to appear at the scheduled *Skelly* hearing. He had subsequently reviewed the records and found that her absence without leave was cause for termination.

Flores testified about the series of leaves and the forms she filled out requesting them. She said that when she filled out the final form for the leave beginning April 14, 2010, an employee helped her and told her what to write on the form, as had happened with the previous forms. She wrote that the leave she was requesting was through June 17, 2010, not April 27, 2010. As Flores was leaving the human resources office after filling out the form, the employee said, "See you in two months, Dolores." Flores

[2] *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.

did not recall receiving any letters from the hospital in April, May, or June 2010. She did recall receiving the letter announcing her termination in July 2010. A number of certified mail return receipts were admitted into evidence with a recipient's signature on them. On these, however, the recipient's first name was spelled "Delores," and Flores, whose first name is Dolores, testified that it was not her signature. Flores identified her signature on a leave-of-absence form. There are obvious differences between the signature on the leave-of-absence form and the signatures on the return receipts, in addition to the difference in spelling.

Flores recalled two telephone conversations. Jackie Black called in June 2010 to say the human resources office had never received a doctor's note and that Flores needed to speak to a human resources employee named Devin Daugherty. Flores spoke to Daugherty, who told her about the *Skelly* hearing and explained that it would be a meeting with three people who would decide whether or not Flores would keep her job. Flores asked what Daugherty thought would happen, and Daugherty said, "I don't think you have a chance." Flores then spoke to her union representative, who advised her to get a lawyer. She did not go to the *Skelly* hearing.

Flores testified that after she lost her job, her husband left her alone with her two sons, saying he could not manage without her help. Having no income, she lost her house. Before her termination, she had expected that the hospital would move her to a position compatible with her injury. She had received accommodation of that kind in the past, a temporary position in the dietary office during the first year after the 2008 injury. After her termination, she had looked for office work but had found none.

On cross-examination, Flores testified that the addresses to which the letters were sent were addresses where her mother lived. She stayed with her mother during part of the time she was away from work, but she did not check for mail addressed to herself because she was not expecting to receive any. She did not know whether the letters were delivered to those addresses.

Flores admitted that, after receiving the termination letter, she never asked for a different position at the hospital, a position compatible with her injury. She also testified that her doctor never released her to work without restrictions by the time of the termination letter of July 12, 2010, and that she remained unable to do the tasks of a patient services associate at the time of trial:

> "Q. All right. Let me ask it this way, ma'am. During the timeframe of October 22, 2009, through the termination letter of July 12th, 2010, did your doctor ever release you to return to work under any conditions?
>
> "A. No.
>
> "Q. You weren't allowed to return to work with restrictions?
>
> "A. Correct.
>
> "Q. He kept you off the whole time?
>
> "A. Correct.
>
> "Q. Now, this last request for leave, you had asked to be off work through June 17th, 2010; correct?
>
> "A. The doctor—yes, the doctor took me off.
>
> "Q. And you submitted the request based on that; correct?
>
> "A. Yes.
>
> "Q. Was there any certainty at that time that you were going to be able to return to work on June 17th, 2010, when you submitted the request?
>
> "A. The way I was feeling, no.
>
> "Q. You still have problems with your back, don't you?
>
> "A. Yes, I have. Yes.
>
> "Q. And, in fact, your back problems pretty much affect all of your daily activities, don't they?
>
> "A. My daily and my night sleep, yes.

"Q. You have trouble bathing and dressing?

"A. Tying my shoes is the worst.

"Q. Walking and standing is a problem?

"A. Sitting is too.

"Q. Are you worse now with your back than you were back then?

"A. Yes. It's going up to my shoulder now. It's going up to the middle of my back behind my let. My right leg—my left side is starting to feel a little bit but not as bad as my right side.

"Q. Based on your physical complaints of pain and discomfort that you experience on a daily basis now, you're not capable of working as a patient services associate yet, are you?

"A. No. My doctor said I cannot do that."

After Flores's counsel rested, the county made a motion for nonsuit. The motion argued that the first two causes of action, disability discrimination and failure to provide reasonable accommodation, should be nonsuited because Flores presented no evidence that she would ever again have been able to perform the essential duties of a patient services associate, with or without reasonable accommodation, and no evidence that there was an existing, vacant, alternative position she would have been able to perform, with or without reasonable accommodation. For the third cause of action, failure to engage in a good-faith interactive process, the motion argued that Flores never requested any form of accommodation except for a leave of absence and did not present evidence that it was likely she would be able to return to work as a patient services associate, with or without reasonable accommodation. In addition, Flores did not present evidence that she was willing to engage in an interactive process as she failed to respond to the county's attempts to contact her about the problems with her leave request. Finally, Flores did not establish a remediable injury arising from any failure to engage in an interactive process because she did not, in the course of the litigation, identify a reasonable accommodation:

She did not present evidence that there was an existing, vacant job she could perform, with or without reasonable accommodation, and she did not present evidence that she was likely to be able to return to the position of patient services associate, with or without reasonable accommodation.

In response to the motion, Flores's counsel requested dismissal of her first two causes of action, leaving only the claim of failure to engage in a good-faith interactive process. He contended that, for that cause of action, there is no requirement that a plaintiff show an available position that she could perform, with or without reasonable accommodation, so that a good-faith interactive process could have led to her continued employment. Instead, counsel argued, section 12940, subdivision (n), requires proof only of the employer's failure to engage in an interactive process in good faith. He contended that the evidence showed this failure because the hospital changed the ending date of the leave Flores requested and then claimed she had never made a request for a leave lasting until June 17, 2010. The court asked counsel how Flores could show a remediable injury—damages—without evidence that she could return to her old position or that there was an alternative position she could take, with or without accommodation. Flores's counsel replied that the damages were the loss of Flores's right to apply for a disability retirement: If the alteration of the date on the leave-request form had not occurred, Flores would not have been terminated for failing to return to work after April 27, 2010; then after her leave expired on June 17, 2010, she would have been required to apply for a personal-necessity leave; when that expired, she would have been required to apply for a disability retirement. Instead, she was fired.

In his rebuttal argument, counsel for the county maintained that there was no evidence that Flores lost the chance to apply for a disability retirement or that she was vested or eligible for one. He also argued that case law supported his view that Flores was required to identify a position—her old one or an existing, vacant alternative—that

she could perform, with or without accommodation. He acknowledged that there was conflicting case law as well.

The trial court granted the motion. It ruled that a plaintiff making an interactive-process claim must identify a reasonable accommodation, and that in this case this requirement meant Flores had to show either that she could return to her former job, with or without reasonable accommodation, or that there was an existing, vacant alternative job she could perform, with or without reasonable accommodation. She failed to do so. Her alternative theory of a remediable injury—that she lost the chance to apply for a disability retirement—was speculative because there was no evidence that she would receive one if she had applied and no evidence of how much money it would have been worth if she had received it.

DISCUSSION

Flores argues that the trial court erred in granting the motion for nonsuit on her third cause of action. We disagree.

A motion for nonsuit is made after a plaintiff rests, and it argues that, as a matter of law, the evidence presented cannot support a judgment in the plaintiff's favor. The motion should be granted only if, indulging all legitimate inferences in the plaintiff's favor, there is no substantial evidence to support a plaintiff's verdict, and a reviewing court would be compelled to reverse such a verdict for insufficient evidence. (*In re Lances' Estate* (1932) 216 Cal. 397, 400-401.) In reviewing the ruling, we apply the same standard. (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838-839.)

Section 12940, subdivision (n), requires an employer to "engage in a timely, good faith interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." This provision creates a duty on the part of the employer to engage in an informal process with the employee to identify a reasonable accommodation. (*Wilson v.*

County of Orange (2009) 169 Cal.App.4th 1185, 1195.) The employee must initiate the process unless the disability and resulting work limitations are obvious. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1013 (*Scotch*).) The employer's obligation arises when it becomes aware of the need to consider providing an accommodation. (*Ibid.*) Both parties have an obligation to keep communications open and both must undertake reasonable, good-faith efforts to communicate their concerns and provide information. If communications break down, the party who failed to participate in good faith is responsible. (*Id.* at p. 1014.)

As the arguments in the trial court indicated, there is a split of authority among the Courts of Appeal regarding section 12940, subdivision (n). Can a plaintiff prevail by showing only that the employer failed to engage in an interactive process in good faith, or must the plaintiff also show that a reasonable accommodation existed that could have been uncovered by an interactive process?

The Second District Court of Appeal, Division 6, considered this issue in *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413 (*Wysinger*). The question there was whether a jury reached inconsistent verdicts by finding that the defendant did not fail to provide a reasonable accommodation, but did fail to engage in an interactive process. (*Id.* at p. 424.) The defendant contended that a failure to engage in an interactive process could not be shown unless the plaintiff showed that his disability could reasonably have been accommodated. (*Id.* at p. 426.) In an opinion by Justice Gilbert, the court rejected this view. It stated that subdivision (n) of section 12940 would be superfluous if, like subdivision (m), it required proof that a reasonable accommodation could have been, but was not, provided. Further, employees cannot be expected to be able to prove that a reasonable accommodation was available when the employer controls information necessary to make that determination and has failed to engage in an interactive process that would have brought that information to light. (*Wysinger, supra,* at p. 426.)

The First District Court of Appeal, Division 5, rejected *Wysinger* in *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952 (*Nadaf-Rahrov*). Justice Reardon wrote that, even if an employer's intransigence prevented an employee from finding out about a reasonable accommodation *at the time the dispute arose*, it remained reasonable to impose on the employee the burden of learning of an accommodation *via the discovery process during litigation.* Further, this same distinction shows that requiring a plaintiff to prove that a reasonable accommodation was possible does not render section 12940, subdivision (n), a superfluous addition to subdivision (m). A claim under subdivision (n) is appropriate when the plaintiff was prevented from discovering a reasonable accommodation during his or her employment but does discover one through litigation. By contrast, subdivision (m) is the proper vehicle when the plaintiff did know of a reasonable accommodation before suing. (*Nadaf-Rahrov, supra,* at p. 983.) Finally, *Wysinger* failed to explain how damages for failing to engage in an interactive process could be determined if it had never been possible reasonably to accommodate the plaintiff's disability. (*Nadaf-Rahrov, supra,* at p. 982, fn. 13.) The court concluded that the availability of a reasonable accommodation is an element of a claim under section 12940, subdivision (n), and that the plaintiff has the burden of proving it. (*Nadaf-Rahrov, supra*, at pp. 983-984.) (See also *Scotch, supra*, 173 Cal.App.4th at p. 1018 [purporting to reconcile *Wysinger* and *Nadaf-Rahrov*, but agreeing with latter that § 12940, subd. (n), plaintiff must prove that reasonable accommodation was available].)

In this case, the trial court resolved the split of authority in the county's favor, relying on *Scotch*. The county now contends that this was correct and that the nonsuit was correctly granted because Flores did not present substantial evidence that a reasonable accommodation was available at the time when the interactive process should have occurred.

Flores does not, in this appeal, argue that *Scotch* and *Nadaf-Rahrov* were wrongly decided and that *Wysinger* should be followed, as she argued in the trial court. Instead,

she argues that she *did* identify a reasonable accommodation that could have been provided: a leave of absence until June 16, 2010, after which she would have been able to return to work, with or without a reasonable accommodation.

Because this is Flores's argument, we need not decide whether a plaintiff making a claim under section 12940, subdivision (n), is required to show that a reasonable accommodation was possible. Flores's only theory of the case, as presented in this appeal, is that she satisfied this requirement. Therefore, our only task is to determine whether, as a matter of law, the evidence could support a finding that she did so.

We conclude that it did not. Flores's own testimony was that she could not return to her old job, even with restrictions, at the end of the requested leave, or by the time she was terminated, or at the time of trial. There was no evidence that she would likely be able to perform that job, with or without reasonable accommodation, in the foreseeable future. There was no evidence that the county had another existing, vacant job that Flores could do, with or without reasonable accommodation. In light of this, a reasonable jury would not have been able to find that Flores presented substantial evidence that a reasonable accommodation was possible.

Flores relies on the note from her primary-care doctor stating that she should be off work from April 14 to June 16, 2010. She points out that the note did not state that Flores would have work restrictions after June 16, 2010. Contrary to Flores's view, however, this omission is not evidence that Flores would have been able to return to work without restrictions after June 16, 2010. The note does not show anything about what Flores's condition would be after that date.

Flores also relies on testimony by Nunn that, before Flores's primary-care doctor recommended a leave of absence beginning April 14, 2010, Flores's workers' compensation doctor released Flores to return to work without restrictions. We do not see how evidence that Flores could perform her job before the requested leave is evidence that she would be able to perform it after.

Finally, Flores argues that, although she testified she could not work at the end of the requested leave on June 16, 2010, or when her employment was terminated on July 12, 2010, or at the time of her testimony on August 28, 2012, the jury still could have inferred that she was able to work, with or without accommodation, between the end of the requested leave or the time of her termination and the time of trial. There was, however, no evidence upon which that inference could have been based.

For all these reasons, we hold that Flores presented no substantial evidence on the basis of which the jury could have found that a reasonable accommodation existed that would have allowed her to continue working for the county. The trial court did not err in reaching the same conclusion. Flores does not argue that the trial court made any other error.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to county.

_____
Hoff, J.*

WE CONCUR:

_____
Cornell, Acting P.J.

_____
Gomes, J.

*Judge of the Superior Court of Fresno County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.